

December 9, 2004

**VIA ECFS**

Federal Communications Commission  
Office of the Secretary  
445 - 12th Street, SW  
Washington, DC 20554

**RE: CC Docket No. 02-6  
Request for Review**

<b>SLD Action Being Appealed:</b>	<b>Two FCDL denials dated April 27, 2004</b>
<b>Applicant Name:</b>	<b>Cleveland County Memorial Library</b>
<b>Entity Number:</b>	<b>126963</b>
<b>Forms 471 Application Numbers:</b>	<b>401354 and 401368</b>
<b>Funding Request Numbers:</b>	<b>1097622 and 1097643 respectively</b>
<b>Funding Year:</b>	<b>FY 2004 (July 1, 2004—June 30, 2005)</b>
<b>Service Provider Names:</b>	<b>Bell South Telecommunications, Inc. and North Carolina Dept. of Commerce respectively</b>
<b>Pre-Discount Amount:</b>	<b>\$2,216.40 and \$10,800 respectively</b>
<b>Contact for this Appeal:</b>	<b>Carol H. Wilson Director Cleveland County Memorial Library 104 Howie Drive Shelby, NC 28150-5036 Telephone: 704-487-9069 Fax: 704-487-4856 Email: cwilson@ccml.org</b>

To Whom It May Concern:

In two funding commitment decision letters issued by the SLD on April 27, 2004, the Cleveland County Memorial Library was denied funding for Form 471 Application Numbers 401354 and 401368. The SLD's reason for denial was: "During PIA review, you provided information that you do not have a written Technology Plan. FCC rules require that applicants have a tech plan if they are seeking discount for more than basic phone service. The services in this FRN are more than basic phone service." The Cleveland County

Memorial Library is hereby appealing that decision. The Library has an approved technology plan which meets the requirements of the Telecommunications Act of 1996 and FCC rule 54.504(b)(2). We therefore request that the funding commitments for these applications be issued without further delay.

The Cleveland County Memorial Library, consistent with the applicable laws and rules governing the E-rate program, had an approved technology plan which included the services at issue at the time of the Form 470 filing. That approved technology plan included the services at issue at the time of the Form 471 filing. And, we were covered by an approved technology plan which included the services at issue at the time of the beginning of the receipt of services. We will be covered by an approved technology plan at the time of the filing of the Form 486. **At no time in the application cycle will the library not be covered by an approved technology plan that includes the services at issue in this appeal.**

A copy of our technology plan as well as information about the technology planning review and approval schedule established by the State Library of North Carolina—consistent with the guidance provided by the SLD—was provided during PIA review on March 2, 2004.

In support of our appeal, we provide the following information to show the inconsistencies between the Telecommunications Act of 1996 and the Code of Federal Regulations on the one hand, and the SLD guidance on technology planning on the other. We strongly assert that we have followed both the letter and intent of the law and rules governing this program as outlined below and, to the best of our ability, have bridged the gap between the requirements of the law and rules with the forms and processes established by the Administrator which are inconsistent with those requirements. We do not feel that the Cleveland County Memorial Library should be penalized for the inconsistent guidance and non-compliant processes established by the Administrator.

### **Background—The Telecommunications Act of 1996:**

The Telecommunications Act of 1996, in establishing the E-rate program, requires that a bona fide request for services be made:

#### **47 U.S.C. § 254(h)(1)(B)**

“(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties...”

The FCC, in the May 8, 1997 *Universal Service Order*, describes a three-step process required to make the bona fide request for discounted services as required under the law. Noting their concurrence with the Joint Board's finding that Congress intended to require accountability on the part of schools and libraries, the FCC states that schools and libraries must:

- (1) Conduct internal assessments of the components necessary to use effectively the discounted services they order;
- (2) Submit a complete description of services they seek so that it may be posted for competing providers to evaluate; and
- (3) Certify to certain criteria under penalty of perjury.

With regard to Item 1 above, the Commission has implemented a self-certification process in Item 15 of the Form 470 for the applicant to assure the Administrator that they will be able to "make effective use" of the eligible services requested in the Form 470. In addition to requiring this first element of the bona fide request, the Commission calls for schools and libraries to prepare specific plans for "using" these technologies "over the near term and into the future," including how they plan to integrate the use of these technologies into their curriculum. Note that the Commission, in their discussion, acknowledges that the purpose of preparing technology plans is focused on "using these technologies" and not on the technologies themselves. In fact, the *Order* specifically states that where plans have been approved for other purposes, those plans will be accepted without the need for further independent approval.

Items 2 and 3 from the above list of applicant requirements for bona fide requests are addressed by other steps in the E-rate application process. Item 2 above is accomplished by submitting a Form 470 application "in sufficient detail to enable potential providers to formulate bids," while Item 3 is accomplished by completing, where necessary, and signing certain certifications.

The Cleveland County Memorial Library has met these requirements for submitting a bona fide request.

### **Background—Code of Federal Regulations:**

The Code of Federal Regulations for the period in which these applications were filed stated at 47 C.F.R. § 54.504(b)(2) that:

**"FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that: ...(vii) The school, library, or consortium including those entities has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission."**

In this regard, the SLD's implementation of technology plan requirements at the time that this rule was in force did not comply with this rule to have certified (approved) plans at the time of the Form 470 submission. Rather, the SLD guidance (see below) calls for a recommended three-year planning and approval cycle to coincide with the earlier of the submission of the Form 486 or start of services.

The Cleveland County Memorial Library, however, did meet the requirement established by the FCC and did indeed have a certified (approved) technology plan at the time of the Form 470 filing as certified on their relevant Forms 470.

### **Background—SLD Guidance Document on Technology Planning:**

As stated above, the SLD guidance document on technology planning did not comply with the Code of Federal Regulations in force at the time of the filing of the relevant applications. Moreover, this document—which is used as guidance by thousands of applicants each year—contains several inconsistencies itself, leading to significant confusion about technology plan requirements including the technology plan approval cycle. (See <http://www.sl.universalservice.org/apply/step2.asp>)

1. The SLD guidance indicates that Section 254(h)(1)(B) of the Telecommunications Act of 1996 stipulates that program discounts must be based on an approved technology plan. Please see the citation from the Act as described in the background information above. Note that the Act does not refer to a requirement for an “approved technology plan.” It does require a bona fide request for service but there is no mention of an approved technology plan.
2. The SLD guidance also indicates that the *Universal Service Order* at paragraph 573 stipulates that discounts must be based on an approved technology plan. Paragraph 573, however, does not stipulate that program discounts be based on an approved technology plan. Please see the citation from the Order as described in the background information above which does describe the elements of a bona fide request required in order to receive discounts.
3. The SLD, in their guidance document, states that “[t]o ensure that schools and libraries are prepared to use the requested services effectively, and to make certain that students and community members experience the real benefits of the Universal Service Program, applicants must certify that their requests are based on approved technology plans that include provisions for integrating telecommunication services and Internet access into their educational program or library services. Most schools and libraries have already developed such plans and may only need to modify these existing plans slightly to conform with E-rate program technology plan criteria.” [Emphasis added.]
  - a. Here, the SLD states that applicants must certify that their requests for services (not receipt of services) are based on an approved technology plan which seems

to be consistent with the FCC rule (see 47 C.F.R. § 54.504(b)(2) above) requiring technology plan approval at the time of the Form 470 submission. Later in the same document (Section IV), however, the SLD indicates that an approved technology plan is not required at the time of the Form 470 filing (contrary to the rule in place at the time) but that an approved technology plan is required at the time of the Form 486 (Receipt of Services) filing or the start of services, whichever is earlier. The SLD specifically states that: “It is important to note that the Technology Plan approval process does not have to be completed to file Forms 470 and 471.” This guidance is completely inconsistent with the FCC’s rule and creates confusion about the timelines for the suggested three-year technology planning and approval cycle.

- b. The SLD guidance above also states that the certification must include provisions for integrating telecommunication services and Internet access into their educational program or library services (which seems to be consistent with the FCC’s intent that the plan focus on integrating technology into the school or library’s services), however, we do not find any such certification regarding such integration in the Form 470, Form 471, or Form 486. Note that our technology plan does, however, address our need for Internet access (the requested services) and the impact on library services.
- c. The SLD guidance above suggests that plans may only need to be modified to conform to E-rate technology plan criteria. The criteria for an approved Technology Plan for a Universal Service Discount listed below, along with the FCC’s direction that technology plans prepared for other purposes were allowable, clearly demonstrate that it was not the intention of the Commission or the Joint Board that specific E-rate eligible services lists tied to the E-rate program be the basis of technology plans. Note also that the criteria below for a successful technology plan do not include requirements for the identification of specific pieces of equipment to be identified (which would indeed be contrary to the FCC’s acceptance of technology plans created for other program purposes and contrary to the criteria for a bona fide request as set out in the law and as defined in the *Order*.)
  - 1. The plan must establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services;
  - 2. The plan must have a professional development strategy to ensure that staff know how to use these new technologies to improve education or library services;
  - 3. The plan must include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services;
  - 4. The plan must provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional

development, and other services that will be needed to implement the strategy; and

5. The plan must include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

Note that the Cleveland County Memorial Library's technology plan addresses the five criteria for "a successful technology plan."

4. The SLD guidance suggests that "there is no need to write or develop a specific Universal Service Program or "E-Rate" technology plan. As discussed in Section IV of this document, it is only necessary that an approved plan include a sufficient level of information to justify and validate the purpose of a Universal Service Program request. It does not have to include the specific details and information called for on FCC Forms 470, 471, 486 and 500. The information provided on those forms should build on the foundations provided by the approved Technology Plan, by documenting specific implementation details and operational steps that are being taken under the plan. That information will be considered a refinement of the plan, as long as the requested services can be supported by the plan." Note that this guidance is consistent with the FCC rule but inconsistent with the SLD's implementation of the rule. [Emphasis added.]

Note that the Cleveland County Memorial Library's approved technology plan addresses the need for the Internet Access services requested on the Form 470.

5. The SLD guidance suggests that a three-year planning cycle is appropriate but acknowledges that there "may be cases in which an approved plan is longer than three years to conform to federal, state, or local requirements."

Note that the Cleveland County Memorial Library's technology plan is on a three-year planning and approval cycle established by the State Library of North Carolina consistent with this guideline.

### **History of Technology Planning for Libraries in North Carolina:**

In the Fall of 2000, consistent with SLD guidance, the State Library of North Carolina moved from a one-year to a three-year creation and review cycle to align with the three-year planning cycle recommended by the SLD. All North Carolina libraries were notified that they would need to have technology plans approved and on file with the State Library before a Form 486 could be filed for Funding Year 4 (2001) services. This approval cycle was established to be compliant with the guidance from the SLD (see 3-a above). A due date of April 12, 2001 was set for receipt of technology plans giving the Library of North Carolina time to review those plans and to provide the libraries of North Carolina with the required documentation certifying their plan approval. Those technology plans were approved for the three-year period July 1, 2001 through June 30, 2004 in order to ensure that the plans were

approved prior to the earlier of the receipt of services or the submission of the Form 486 as stated on the SLDs guidance document. The State Library of North Carolina took every step necessary to comply with the SLD's requirement that plans be approved on a three-year planning cycle prior to the submission of the Form 486 or start of services. This year, technology plans were once again submitted as part of the three year planning cycle (July 1, 2004 through June 30, 2007) such that review and approval occurred prior to July 1, 2004 or the start of services. The State Library of North Carolina provides a template for the completion of the technology inventory/assessment (step 1 of the bona fide request) and has also supplied a template for a technology plan that addresses the five criteria established by the SLD "to qualify for an approved technology plan for a Universal Service Program discount..."

### **Compliance:**

As indicated during PIA review, the Cleveland County Memorial Library has a technology plan that was certified (approved) by the State Library of North Carolina. We certified to this fact, as required in the above rule in force at the time of application submission, on our respective Form 470 application numbers 580970000461657 and 938840000461490 stating in Item 21(a) that the status of our technology plan was: "technology plan has been approved by a state or other authorized body."

The Cleveland County Memorial Library, along with the State Library of North Carolina, has taken every step required under the law and the FCC rule. In addition, we have taken every step possible to comply with the SLD guidance as best we could given the inconsistency of the Forms and SLD guidance with the law and rule:

- We submitted a bona fide request for services:
  - We provided an inventory/assessment of the components necessary to use effectively the discounted services ordered using the template provided by the State Library of North Carolina.
  - We submitted a complete description of services on the relevant Forms 470 so that those requests for services could be posted for competing providers to evaluate; and
  - We correctly completed the certifications provided to us by the SLD under penalty of perjury.
- We submitted a technology plan to the State Library of North Carolina for approval as prescribed by the SLD.
- We had an approved technology plan at the time of the Form 470 submission (consistent with the FCC rule.)
- The services requested on our Forms 471 are consistent with the approved plan.
- We followed the technology planning requirements prescribed by the State of North Carolina which were based on guidance from the SLD.
- The State Library of North Carolina's review of our technology plan was based on the five criteria required by the SLD for a successful technology plan.

- We received a certification of technology plan approval from the State Library of North Carolina as required by the SLD.
- We filed an updated plan for the next three-year cycle consistent with the SLD's guidance document and such that the State Library of North Carolina could issue a certification of approval prior to the start of service on July 1, 2004 and prior to the submission of the Form 486 for receipt of services (consistent with the SLD's technology planning guidance document).

**Summary:**

The Cleveland County Memorial Library has complied with all applicable laws and rules regarding technology planning. Once again, we reiterate that there is no time during the application cycle—at the time of the Form 470 filing, at the time of the Form 471 filing, at the start of service, or at the time of the Form 486 filing—that the Cleveland County Memorial Library will not be covered by an approved technology plan for the requested Internet services.

Given the non-compliance of the SLD in implementing the FCC's rule regarding technology planning, and given the inconsistency of information provided by the SLD on this topic, and given that there was no requirement in the law or the rules at the time of these form filings that technology plans be "written" at the time of the Form 470 submission (as stated in the FCDL decision), and given the compliance on the part of the Cleveland County Memorial Library and the State Library of North Carolina with the requirements of the law and the rule as described above, we request that funding be awarded without further delay.

Thank you for your prompt attention to this matter.

Sincerely,

Carol H. Wilson  
Director